

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LYMAN L. SIMS, SR., ) No. C 06-3695 TEH (PR)  
Plaintiff, )  
v. )  
WARDEN EDDIE YLST, ) **ORDER OF DISMISSAL,  
DIRECTOR MRS. J. WOODFORD, et ) DENYING MOTION TO STAY  
al, ) PROCEEDINGS AND TO  
Defendants. ) PROCEED IN FORMA PAUPERIS,  
 ) AND INSTRUCTIONS TO THE  
 ) CLERK  
 )  
 ) (Docket Nos. 3, 10)**

Plaintiff, a prisoner of the State of California currently incarcerated at Pelican Bay State Prison in Crescent City, California, filed a civil rights complaint under 42 U.S.C. § 1983 regarding the conditions of his confinement at San Quentin State Prison. On April 9, 2007, this Court dismissed the complaint with leave to amend, denied leave to proceed in forma pauperis based on Plaintiff's failure to file a complete application, and ordered Plaintiff to file an amended complaint and a complete application to proceed in forma pauperis within thirty days of the date of this order.

Thereafter, on April 26, 2007, Plaintiff filed a motion seeking a “stay of proceedings pending exhaustion of administrative appeal procedures” (docket no. 10). In the motion, Plaintiff states that he commenced the process of exhausting his administrative appeals with regard to the instant complaint by filing an inmate/parolee appeal form 602 on June 19, 2006, shortly after he filed this case on June 9, 2006. Plaintiff further alleges that he has not yet completed the administrative appeals process with regard to his claims. Accordingly, the Court will dismiss the complaint without prejudice to Plaintiff filing a new complaint after he has completely exhausted the

1 administrative remedies available to him.

2 **DISCUSSION**

3 The Prison Litigation Reform Act provides that “[n]o action shall be brought with  
 4 respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a  
 5 prisoner confined in any jail, prison, or other correctional facility until such  
 6 administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a).

7 Exhaustion is mandatory and no longer left to the discretion of the district court.

8 Woodford v. Ngo, 126 S. Ct. 2378, 2382 (2006) (citing Booth v. Churner, 532 U.S. 731,  
 9 739 (2001)). "Prisoners must now exhaust all 'available' remedies, not just those that  
 10 meet federal standards." Id. Even when the relief sought cannot be granted by the  
 11 administrative process, i.e., monetary damages, a prisoner must still exhaust  
 12 administrative remedies. Id. at 2382-83 (citing Booth, 532 U.S. at 734).

13 An action must be dismissed unless the prisoner exhausted his available  
 14 administrative remedies before he or she filed suit, even if the prisoner fully exhausts  
 15 while the suit is pending. McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002); see  
 16 Vaden v. Summerhill, 449 F.3d 1047, 1051 (9th Cir. 2006) (where administrative  
 17 remedies are not exhausted before the prisoner sends his complaint to the court it will be  
 18 dismissed even if exhaustion is completed by the time the complaint is actually filed).

19 Although exhaustion is an affirmative defense, the Court may dismiss a complaint  
 20 sua sponte for failure to exhaust if it is clear from the face of the complaint and attached  
 21 exhibits that Plaintiff has not satisfied the exhaustion requirement. Wyatt v. Terhune,  
 22 315 F.3d 1108, 1119-20 (9th Cir. 2003); cf. Franklin v. Murphy, 745 F.2d 1221, 1228-30  
 23 (9th Cir. 1984) (although running of statute of limitations is affirmative defense, it may  
 24 be grounds for sua sponte dismissal where defense is complete and obvious from face of  
 25 the pleadings).

26 The State of California provides its inmates and parolees the right to appeal  
 27

1 administratively "any departmental decision, action, condition or policy perceived by  
 2 those individuals as adversely affecting their welfare." Cal. Code Regs. tit. 15, §  
 3 3084.1(a). It also provides its inmates the right to file administrative appeals alleging  
 4 misconduct by correctional officers. See id. § 3084.1(e). In order to exhaust available  
 5 administrative remedies within this system, a prisoner must proceed through several  
 6 levels of appeal: (1) informal resolution, (2) formal written appeal on a CDC 602 inmate  
 7 appeal form, (3) second level appeal to the institution head or designee, and (4) third  
 8 level appeal to the Director of the California Department of Corrections. Id. § 3084.5;  
 9 Barry v. Ratelle, 985 F. Supp. 1235, 1237 (S.D. Cal. 1997). This satisfies the  
 10 administrative remedies exhaustion requirement under § 1997e(a). Id. at 1237-38.

11 Here, Plaintiff alleges in the motion that he did not exhaust his claims through all  
 12 levels of the state prison administrative grievance system before filing suit and requests a  
 13 stay of the proceedings to do so. See Motion at 2 (docket no. 10). Because exhausting  
 14 the claims now would not cure the failure to do so before filing suit, the motion is  
 15 DENIED (docket no. 10). See McKinney, 311 F.3d at 1199. Therefore, the complaint is  
 16 DISMISSED without prejudice. Plaintiff may file a new complaint, alleging the same  
 17 subject matter of the substantive complaint, if and when he exhausts the administrative  
 18 remedies available to him. Based upon this dismissal, Plaintiff's previously filed motion  
 19 for leave to proceed in forma pauperis (docket no. 3) is DENIED as moot and no fee is  
 20 due. The Clerk shall close the file and enter judgment in accordance with this order.

21 SO ORDERED.

22 DATED: 05/14/07

23   
 24 THELTON E. HENDERSON  
 25 United States District Judge